

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF VIRGINIA  
3 Charlottesville Division

4 CYNTHIA B. SCOTT, et al., Civil No. 3:12cv00036

5 Plaintiffs,

6 vs.

Harrisonburg, Virginia

7 HAROLD W. CLARKE, et al.,

11:33 a.m.

8 Defendants.

May 30, 2018

9 TRANSCRIPT OF TELEPHONIC MOTIONS HEARING  
10 BEFORE THE HONORABLE JOEL C. HOPPE  
11 UNITED STATES MAGISTRATE JUDGE

12 APPEARANCES:

13 For the Plaintiffs:

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1 THE COURT: Good morning. This is Joel Hoppe.

2 Who is on the line for the plaintiffs?

3 MS. CIOLFI: Good morning.

4 This is Angela Ciolfi with the Legal Aid Justice  
5 Center, for the plaintiff, and with me in the room are Brenda  
6 Castaneda and Shannon Ellis, also with the Legal Aid Justice  
7 Center.

8 I heard a lot of chiming in, so I'm not entirely sure  
9 who else for plaintiffs is on the line.

10 MS. NASH: Good afternoon, Your Honor.

11 This is Casey Nash from Kelly and Crandall on behalf  
12 of the plaintiffs as well.

13 MS. ROLLA: Your Honor, Kimberly Rolla on behalf of  
14 the plaintiffs, with Legal Aid Justice Center.

15 MR. HOWARD: Good morning, Your Honor.

16 This is Ted Howard from Wiley and Rein in Washington  
17 for the plaintiffs.

18 THE COURT: Good morning to all of you.

19 Who's on the line for the defendants?

20 MS. LONDOS: Katherine Londos and Nate Schnetzler,  
21 with Frith Anderson & Peake in Roanoke.

22 MS. ABATO: Diana Abato and Victoria Pearson with the  
23 AG's office in Richmond.

24 MS. MULDOWNNEY: Elizabeth Muldowney from Sands  
25 Anderson in Richmond.

1 MS. GRIGGS: Ruth Griggs from Sands Anderson.

2 THE COURT: Karen Dotson is also on the line and  
3 she's recording this hearing so there is a record of our  
4 discussions today.

5 We are here on the defendant's motion to continue and  
6 I have reviewed the plaintiff's response to that.

7 Who's going to address the motion for the defendants?

8 MS. LONDOS: Good morning, Your Honor. This is  
9 Katherine Londos with Frith Anderson and Peake in Roanoke.

10 Your Honor, shortly before we got on this call, the  
11 defense made a determination that we would withdraw -- we are  
12 withdrawing the motion for a continuance. Defendants are  
13 ready to proceed, and, thus, we will withdraw the motion.  
14 Again, that decision was made just shortly prior to getting  
15 on the call.

16 There is one caveat I want to mention, and I raise  
17 this simply as -- in my role as an officer of the court. We  
18 have serious reservations that this is a five-day proceeding.  
19 We are ready to go. We're not asking for a continuance as  
20 stated in the motion at this time, but feel an obligation to  
21 advise Your Honor and the court, generally, that given the  
22 posture of this case, and even given the agreement reached  
23 this morning with counsel that we would -- both sides would  
24 simultaneously reduce and narrow their witness and exhibit  
25 lists by the end of this week, it seems like a big bite for a

1 five-day. So we have no reservations, but I certainly would  
2 want to advise the Court. I do not want to arrive and have  
3 Judge Moon look at us and ask what we all thought we could do  
4 in five days. So I raise that issue simply by way of just  
5 putting that out there, but not asking for a continuance at  
6 this time.

7 Thank you.

8 THE COURT: I think that's something that we  
9 certainly can address today.

10 Are there some ways to try and manage the amount of  
11 information that you all want to present at the hearing so  
12 that each side can fairly present its case? I think we all  
13 should -- there have been a number of motions filed in the  
14 last day or so that I think we also need to figure out when  
15 responses are going to be filed on those, and there's a  
16 hearing scheduled for -- I believe it's June 8th -- where  
17 those motions can be taken up. But just given the volume of  
18 the motions and the short amount of time that Judge Moon will  
19 have to address them, you know, it may be that he'll have to  
20 address them in an opinion that's issued after the hearing.  
21 I think that's just a possibility that y'all would need to  
22 contemplate.

23 MS. LONDOS: Your Honor, this is Katherine Londos  
24 again.

25 Several members of the plaintiffs' team and I had a

1 conversation this morning. We are working together to  
2 narrow, specifically, the exhibit and witness lists, but  
3 other issues. Those discussions, I know, will be ongoing.  
4 We're making those efforts. It is still -- I'm saying this  
5 with an understanding of how sometimes these things work. We  
6 don't want to get in a situation where Judge Moon looks at us  
7 later and says counsel should have brought this to my  
8 attention -- to the Court's attention, that this was a lot.  
9 It's in that spirit that I raise the issue.

10 THE COURT: Right. I understand that.

11 When do you all think -- have you set a deadline for  
12 when you're going to shoot to have these narrowed?

13 MS. LONDOS: Friday.

14 THE COURT: Friday.

15 Will you advise the Court of any narrowing or, you  
16 know, some issues you can take off Judge Moon's plate by  
17 then?

18 MS. LONDOS: What we talked about specifically this  
19 morning was narrowing the exhibit and witness lists. I know  
20 all these motions were filed last evening and we're still  
21 processing them, but I know I speak for the defense team that  
22 we will be taking a close look at them and the legal issues  
23 that can be agreed upon or stipulated to or anything along  
24 those lines, we will do that. We're just -- I'm not even --  
25 I haven't even had a chance to download them all and open

1       them all yet before the phone call.

2               THE COURT:   Okay.

3               How about for the plaintiffs?   Do you have anything  
4       you want to say along what Ms. Londos is discussing?

5               MS. CIOLFI:   Yes, Your Honor.   This is Angela Ciolfi  
6       for the plaintiff.

7               We certainly welcome the withdrawal of the  
8       continuance and appreciate Ms. Londos and the Court's efforts  
9       to try to streamline the process as much as possible for the  
10      hearing.   You know, we do acknowledge that there's a lot of  
11      information.   Both parties have submitted, as of last night,  
12      extensive pretrial briefing, so that should provide some  
13      opportunity to frame the issues.   The plaintiffs have  
14      designated several depositions, and as -- with defendants'  
15      motion for summary judgment as well, so, hopefully, we'll be  
16      able to offer a lot of deposition designations as a way to  
17      reduce live testimony to be presented.

18              As Ms. Londos said, plaintiffs offered, and  
19      defendants have agreed, to simultaneously agree to narrow the  
20      exhibit and witness lists.   We are also -- plaintiffs are  
21      also working on factual stipulations.

22              The exhibit and witness lists -- we did agree to  
23      exchange those on Friday.   I think just given where we are in  
24      the week that it would probably likely take, you know, some  
25      portion of the day to do that.   So with that and the motions

1 that were filed last night and the stipulation that we would  
2 like to present to the defendants as quickly as possible, we  
3 would ask that maybe we advise the Court on Monday, giving  
4 us, you know, the weekend, unfortunately, to hash things out  
5 as much as we can. I think we might actually have more  
6 information to provide the Court by Monday.

7 We certainly welcome any other ideas the Court has  
8 for managing the information to be presented.

9 THE COURT: Have you all discussed a date for filing  
10 responses to the motion to exclude experts and the motion for  
11 summary judgment?

12 MS. LONDOS: We have not, no.

13 THE COURT: What did you envision? There's a hearing  
14 date scheduled for the 8th. I imagine that would be what you  
15 all would use to address these motions.

16 MS. LONDOS: Your Honor, I apologize. Just with them  
17 coming in late last night, on that particular question, I  
18 have not had a chance to consult my colleagues on the defense  
19 side on that. Certainly, that's on the table to be discussed  
20 today. We just haven't gotten to it this morning.

21 MS. CIOLFI: And this is Angela Ciolfi.

22 Plaintiffs are in the same position as well. We  
23 would like -- I think having a deadline would be a good thing  
24 for all involved, but I wouldn't want to overly promise,  
25 given the time restraints.



1 THE COURT: I would suggest that Judge Moon is going  
2 to need more than a day to consider responses.

3 MS. LONDOS: May I suggest that I consult with Angela  
4 Ciolfi, and we can continue our discussions -- myself, being  
5 the representative of the defense team, and Ms. Ciolfi being  
6 the representative from the plaintiffs -- that we consult,  
7 hopefully by the end of the day today, to see if we can come  
8 to some agreement on that?

9 THE COURT: Sure. I think that's fine. We'll be  
10 happy to let you all have the first crack at figuring that  
11 out.

12 Are there still depositions outstanding?

13 MS. LONDOS: Yes. And Ms. Riggs may be in a better  
14 position to say exactly from our side. I think maybe even  
15 today.

16 Is that correct, Ms. Riggs?

17 MS. RIGGS: Due to circumstances beyond everyone's  
18 control, we had to postpone Dr. Gable's deposition until next  
19 Tuesday. There was a death at the jail last night and he, as  
20 the medical doctor, is involved and has not slept yet. So  
21 counsel decided it would be more appropriate to give him an  
22 opportunity to sleep and prepare for next week.

23 Then my understanding, Mr. Hasher's 30(b)(6) is on  
24 Friday, so that will leave Mr. Hasher's 30(b)(6) on Friday,  
25 an expert deposition for Dr. Gable and his 30(b)(6) on

1 Tuesday.

2 Counsel and I have been working today to narrow our  
3 understanding of the testimony that Dr. Gable would  
4 potentially be providing as a 26(a)(2)(C) expert, making  
5 clear it's a very limited scope. Essentially, treater  
6 testimony. Hopefully, we'll be able to cut down some of the  
7 time for both his expert deposition and his 30(b)(6) next  
8 week.

9 THE COURT: Okay.

10 MS. CIOLFI: Yes. I believe there's one more  
11 discussion of a short continuation of one of defendant's  
12 experts that was scheduled for tomorrow.

13 MS. RIGGS: Yes, that's tomorrow. I forgot about  
14 that one. I'm sorry.

15 THE COURT: All right.

16 Let me ask you this. As to the actual hearing, have  
17 you all given some thought to allocating each side time to  
18 present evidence just to make sure that one side doesn't  
19 monopolize the time?

20 MS. CIOLFI: This is Angela Ciolfi.

21 We have discussed that to some extent. It's a little  
22 bit complicated by one thing that is, I think, probably  
23 inherent in every case and one thing that's a little unique  
24 about this case. The first one, it's just very difficult to  
25 commit to time frames when neither side is in control of the

1 other person's cross. I know the plaintiffs, you know, are  
2 working very diligently to try to contain and to reduce the  
3 number of witnesses and contain the amount of evidence that  
4 will be presented in their case in chief to allow the  
5 defendants an opportunity to present their defense and for us  
6 to cross-examine their witnesses, but there are some factors  
7 outside of our control.

8           The second one that is more unique is that there is  
9 some -- and the plaintiff has filed a motion in limine on  
10 this question -- about the time frame of the relevant period  
11 for determining liability for contempt, and that is whether  
12 the time frame is from the time the consent order was entered  
13 in February of 2016 to when the motion for show cause was  
14 filed in September of 2017, or whether it's the entire period  
15 leading up to today's status.

16           Both parties acknowledge that the period between  
17 September -- and my intent in laying this out is not to argue  
18 the motion but simply to illustrate to the Court that there  
19 is some difficulty in figuring out how the evidence will be  
20 presented without some resolution of that issue.

21           Both parties have acknowledged that the evidence --  
22 the facts and circumstances following the motion to show  
23 cause leading up to today are relevant, but we are still in  
24 conversations with defendants' counsel about what the --  
25 their position on the appropriate time period for liability.

1 THE COURT: Okay.

2 MS. LONDOS: Your Honor, this is Katherine Londos.

3 The only thing I would add is that -- and this is  
4 always an issue on the defense side of the table -- is that  
5 we are always concerned that the allotted time will be  
6 occupied disproportionately by the plaintiff and the  
7 defendant will not be left with enough time. That is  
8 inherent in the nature of trial practice but one that we are  
9 mindful of, particularly in this case. We certainly don't  
10 want to be left with, you know, two hours on Friday afternoon  
11 to present our case. Those discussions have been ongoing and  
12 I imagine will continue to be ongoing. We're just mindful of  
13 that potential as often happens in these cases. Nothing  
14 unique about this case in particular.

15 THE COURT: These conversations may be more fruitful  
16 after Friday when you've narrowed your witness and exhibit  
17 lists, but certainly each side has a right to present its  
18 case.

19 MS. CIOLFI: Your Honor, this is Angela Ciolfi again.

20 May I ask for clarification on the deadline for  
21 responses for motions in limine that were filed yesterday?  
22 In addition to the motions in limine, defendants also filed a  
23 motion for summary judgment, which is, you know, of much  
24 greater magnitude, of course, than a motion in limine would  
25 be. I believe plaintiffs' position will be that that motion

1 was untimely filed, so, you know, we'll, of course, address  
2 that in the briefing, but I just want to clarify that the  
3 Court does not intend that we would be fully briefing their  
4 46-page motion and supporting exhibits by the time to have it  
5 heard on June 8th.

6 THE COURT: You know, I would think it would be  
7 really probably an impossible task for Judge Moon to be able  
8 to rule on the motion for summary judgment prior to the  
9 commencement of the hearing. Usually, those motions are  
10 filed, under a typical scheduling order, 75 days before  
11 trial, and heard 45 days before or after full briefing. So  
12 that will be a real challenge.

13 Ms. Londos, what's your view on that?

14 MS. LONDOS: Your Honor, this case has been unusual  
15 in so many regards, but one in particular has been the  
16 schedule and the way this case has developed beyond what I  
17 think anyone anticipated back in December of 2017 when I  
18 think a good number of the attorneys on this call today were  
19 not even -- were not involved in the case yet.

20 The number of depositions taken in the last 60 days,  
21 and even the number of depositions taken after May 1, which  
22 was the court's discovery cutoff, is significant. I have  
23 them typed out here and there are, you know -- I don't want  
24 to miscount, but -- some were 30(b)(6) depositions, but  
25 there's been 5 or 6 or 7 or 8 now depositions taken after the

1 discovery cutoff. We have been working diligently. We have  
2 been working collaboratively and cooperatively with counsel  
3 to get everything scheduled. But a lot of what has happened  
4 in this case has happened in the last 30 days. So that's  
5 unique. Usually, for those of us in trial practice, we're  
6 very familiar with the idea of something happening after the  
7 discovery cutoff -- supplemental disclosures and an  
8 occasional deposition. But overall, it feels like a very  
9 large percentage of the discovery in this case happened in  
10 May, and continues to happen. I can't even keep up with the  
11 emails that are coming in about supplemental disclosures, et  
12 cetera. So it's just been a different dynamic than most of  
13 the other cases we're all involved in.

14 So that's where we are and that's why the motions are  
15 being filed when they're filed is, simply, we haven't got  
16 that far. Again, as an indicator, there were depositions  
17 last week and there are depositions this week. It's been an  
18 ongoing process.

19 MS. CIOLFI: Your Honor, I would just like to point  
20 out that the pretrial schedule was the schedule that the  
21 defendants agreed to with full knowledge of what the scope of  
22 this case entailed, including the 56 supporting -- not  
23 declarations but exhibits -- that accompanied plaintiffs'  
24 voluminous motions. So this is really a case of buyer's  
25 remorse on the part of the defendants, and not surprise.

1           This is the schedule that we all agreed to and did  
2 not contemplate motion for summary judgment to be filed. We  
3 contemplated the filing of a pretrial brief as of yesterday,  
4 which is what the plaintiffs filed. The defendants did have  
5 the opportunity to fully brief the motion for show cause that  
6 the plaintiff filed back in September, and they did brief  
7 that, after which both parties had a status conference before  
8 Judge Moon in which he expressly declined to rule on the show  
9 cause until the time of trial. I would submit that the  
10 plaintiffs -- that that is where we stand and that the  
11 plaintiffs have tried to accommodate the numerous delays in  
12 production and rescheduling of depositions due to  
13 availability of defendants' witnesses and their lawyers, and  
14 that we should not now be penalized by the lateness of the  
15 discovery because of the plaintiffs' willingness to  
16 accommodate the multiple schedule changes.

17           THE COURT: Let me just cut in for a second.

18           You know, I can see that both sides have been working  
19 really hard on this case and there's been a great volume of  
20 discovery in a pretty compressed time and significant motions  
21 practice. So it does seem to me that -- I think the way this  
22 case has unfolded is unusual. The pretrial order does not  
23 expressly contemplate motions for summary judgment. I think  
24 that will be something that -- you know, plaintiffs can  
25 certainly raise that with Judge Moon. I don't know what he

1 would say on that, but I would imagine that he certainly  
2 would want to allow the plaintiffs adequate time to respond  
3 to the dispositive motions. I don't see how he could rule on  
4 that prior to the hearing, though. I would think that that  
5 would be something that he would address in a post-hearing  
6 opinion.

7 Go ahead, Ms. Londos.

8 MS. LONDOS: This is Katherine Londos again.

9 Maybe this hearing is a microcosm of this case in  
10 general, but I feel like this hearing -- we've morphed a  
11 little bit into, sort of, the issues with the motion for  
12 continuance. We do -- the defense -- I want to be clear --  
13 wants to be heard on the summary judgment motion. The  
14 summary judgment motion is, I think, crucial to the Court's  
15 hearing of this case. The refrain that we've heard over and  
16 over again is we both have enough attorneys on both sides of  
17 the aisle to get everything done. Hence, all these  
18 depositions that have been scheduled. The defense believes  
19 it's important that Judge Moon hear the issues before the  
20 hearing, and I will not for a minute concede that the defense  
21 has been less than diligent and less than attentive in  
22 everything in this case, and I'm not going to rehash  
23 everything, but that is one point that I want to make clear.  
24 There's been extensive efforts to get everything done and,  
25 certainly, a lot of these depositions are only happening



1 because they were requested later in the process. But the --  
2 we would respectfully ask the opportunity to be heard on the  
3 summary judgment before the hearing, and I understand that we  
4 are dealing with a complicated calendar issue, but at the  
5 beginning of this case, there was an agreement on limited  
6 discovery and that's what we thought we were getting, and it  
7 has not turned out to be, from the defense perspective,  
8 limited.

9 THE COURT: Well, don't forget. You all can add  
10 attorneys to the case but Judge Moon doesn't get to add  
11 judges or law clerks. I know that they are looking at  
12 everything. They're going to do their best to address all  
13 these motions meaningfully and properly.

14 I think it will really be -- I mean, I'll be in touch  
15 with Judge Moon and certainly will let him know that you all  
16 want to have a motion for summary judgment heard, I imagine,  
17 on the 8th at the hearing, but I think there's going to have  
18 to be some consideration about when the plaintiffs' brief is  
19 due and, Ms. Ciolfi, if you're going to raise the time  
20 window, I would encourage you to do that sooner rather than  
21 later. I don't know what Judge Moon will say on that.

22 MS. LONDOS: If I could just add -- and I will stop  
23 talking. I don't mean to keep adding. But if the Court will  
24 not hear the motion for summary judgment prior to the  
25 hearing, that would, I guess, raise the issue of a

1 continuance again. Again, while we're ready to go, we would  
2 like the opportunity to be heard. So I would imagine that  
3 Judge Moon will know what he wants to do on that point, but  
4 we would -- if that involves a continuance to allow us to be  
5 heard, that would be our position -- is that we would like to  
6 be allowed to be heard, notwithstanding everything that's  
7 been said thus far in this hearing.

8 THE COURT: Like I said, I think he'd try to hear the  
9 motion, but I don't know that you're going to have a ruling  
10 on that before trial. You know, it is a bench trial, so it  
11 is probably a motion like the motion to exclude the experts  
12 that can be addressed after the evidence has been presented.

13 There's one motion I think Judge Moon will take up,  
14 and that's the defendants' motion for a view. If he agrees  
15 to do that, I imagine that's something that could be done not  
16 during that five-day period?

17 MS. LONDOS: Absolutely, Your Honor.

18 Whenever Judge Moon wants the site inspection, he  
19 will get the site inspection. We will make that happen.

20 THE COURT: Are there some other considerations about  
21 the schedule and briefing or other things to raise today?

22 MS. CIOLFI: Your Honor, there are other motions  
23 pending, not including the ones that were filed last night.  
24 I don't know that -- I think one may be fully ripe; the  
25 defendants' motion for an extension of email production. I

1 don't think that the other motion has been fully briefed yet.  
2 That would be the plaintiffs' motion for privilege waiver. I  
3 think those are the ones that are pending other than the ones  
4 that have procedurally been filed. I don't know if the Court  
5 wants, at this time, to hear those or not.

6 THE COURT: I think those are some of the outstanding  
7 motions in front of me, and there are some motions to seal  
8 and things like that that I'll take up as soon as I can. I  
9 don't think that -- plaintiffs' motion now, of course, is not  
10 ripe. There's no response, but on the defendants' motion for  
11 extension, I planned on taking that up today.

12 What is the status of the email production? Is it  
13 still ongoing?

14 MS. LONDOS: Your Honor, it is still ongoing. We are  
15 continuing what I would call extensive efforts. The IT  
16 vendor is getting them to us, meaning the defense counsel.  
17 We are processing them internally to review for privilege and  
18 relevancy issues and getting them out as they come. There  
19 are tens of thousands coming in to us and we have people  
20 dedicated here to reviewing them and getting them out. I  
21 think there's one -- another batch, hopefully, going out  
22 today or tomorrow. We have one that just came in end of last  
23 week. 16,008 files came in in the end of last week. 8,500  
24 came in yesterday. So we are diligently and continuously  
25 working on that.

1           But I, too, was not prepared to fully argue that  
2 motion today.

3           THE COURT: Ms. Ciolfi, is there anything  
4 preliminarily that you would want to say on that? The  
5 production is ongoing and sounds like it's still -- are you  
6 receiving substantial amounts of emails?

7           MS. CIOLFI: Your Honor, if I could, I'd like to ask  
8 my colleague, Casey Nash, to respond regarding the motions.

9           THE COURT: Sure.

10          Ms. Nash?

11          MS. NASH: Good afternoon, Your Honor.

12          I think it's our position that -- I mean, the trial  
13 starts in a matter of days. As the defendants have  
14 indicated, they're still receiving tens of thousands of  
15 emails. This is discoverable information that's been  
16 withheld from the plaintiffs and being produced at this late  
17 stage. It's really going to be difficult for the plaintiff  
18 to meaningfully use this and present this at trial,  
19 particularly given that our exhibit list is well past due. I  
20 think, you know, we're now a month beyond the production date  
21 that the Court ordered. So I think that sanctions are  
22 appropriate because, you know, the Court ordered that this  
23 information be produced, and I understand it's a tall order  
24 and I understand that both sides are working really hard.  
25 I'm not going to accuse the defendants of dilatory conduct,

1 but the simple fact is this information was ordered by the  
2 Court. It wasn't produced by the deadline and I really think  
3 that causes some harm to the plaintiffs. So I think  
4 sanctions are appropriate.

5 MS. LONDOS: Your Honor, this is Katherine Londos.

6 I'm sorry.

7 THE COURT: Let me say that I'm not sure that it  
8 makes a whole lot of sense to -- if these emails aren't able  
9 to be used at trial, and if exhibit lists have been  
10 identified and you all are trying to winnow down the exhibit  
11 lists, that the production would continue.

12 I'm wondering, what is -- at this point, Ms. Nash,  
13 what would the purpose be, and are you all seeking that  
14 continued production? Would it make sense to hold it in  
15 abeyance at this time?

16 MS. NASH: I think our position is -- I mean, it's  
17 really hard for us to process information at this time, even  
18 if it's given to us. I'm not sure that it makes sense for  
19 the production to continue, given that it's not going to be  
20 useable. That being said, the plaintiffs provided a list of  
21 these 17 priority email boxes to the defendants on  
22 January 25th. During the April 12th hearing, the Northrop  
23 Grumman representative on the phone indicated that Northrop  
24 Grumman didn't receive the request for the 17 email boxes  
25 until April 4. This delay -- you know, I understand it's a

1 tall order. I understand everyone is working hard. Just not  
2 being able to receive this discoverable information in time  
3 for trial, given that timeline, I think it presents prejudice  
4 to the plaintiffs in preparing their case, and I think there  
5 has to be some consequence for that.

6 THE COURT: Let me say this. I'm not going to go  
7 forward and address any prejudice or sanctions today, if that  
8 would be appropriate at all. I think we all recognize -- and  
9 I certainly did -- that it was going to be a very tall order  
10 to get all these emails produced. You know, the system for  
11 archiving emails and then retrieving them is -- it is really  
12 hard to understand why that was seen as a good way to do it,  
13 but I don't think that falls at these particular defendants'  
14 feet. That decision was made well above their pay grade so I  
15 don't know that it's at all appropriate for me to sanction  
16 them for something that seems like was really out of their  
17 control. Perhaps things could have been started earlier with  
18 the production, but given the request and information that  
19 was sought, it wasn't 17 custodians until we had whittled  
20 things down after, I think, maybe two hearings and then  
21 figured out that was going to be what the defendants needed  
22 to delve into. It was a much larger scope of email recovery  
23 that I voiced some concerns about proportionality of that  
24 overall initial request. So I don't think the delay,  
25 necessarily, all falls at the defendants' feet either.

1           Ms. Nash, as I understand, there are emails y'all are  
2   entitled to that you have not received at this time, but it  
3   sounds like there's been an effort to really get a lot of  
4   them in to you, and it may just be that balancing the  
5   plaintiffs' interests in going forward expeditiously and as  
6   contemplated with the hearing, there would just need to be a  
7   weighing that you all would have to do that, whether getting  
8   every shred of discovery that you're entitled to outweighs  
9   the need to go forward in June with the hearing, and it seems  
10  like the decision has been made to go forward with what you  
11  have and do the best with that information.

12           That's a longwinded way of saying if sanctions are  
13  something that you're seriously going to seek, I think we  
14  would need to address that in another hearing.

15           Ms. Londos, is there something you wanted to say?

16           MS. LONDOS:   No, sir.   Thank you.

17           MS. CIOLFI:   Your Honor, this is Angela Ciolfi.

18           We would request the Court not rule on that at this  
19  time and give us an opportunity -- I think there may be some  
20  factual issues about the timing in which the plaintiffs  
21  narrowed their request that are relevant here, and we would  
22  like an opportunity to talk about whether an additional  
23  hearing might be necessary.

24           THE COURT:   That's fine.   I'm expressly not ruling on  
25  that issue today.

1 MS. LONDOS: Thank you, Your Honor.

2 MS. CIOLFI: Your Honor, there is one last thing. I  
3 apologize.

4 So we -- as Ms. Griggs alluded to, we have  
5 rescheduled Dr. Gable's deposition to Tuesday. The counsel  
6 for both parties have been trying to resolve some objections  
7 that were raised this morning as to the substance of that  
8 testimony, and we're at loggerheads. I think additional  
9 discussions have happened. I hope that we'll be able to  
10 resolve them, but I am anticipating that that may not be  
11 possible.

12 Would the Court like to -- I think it's in everyone's  
13 interest to have this resolved before Tuesday. If we're  
14 unable to resolve it, could we be able to get some time with  
15 you on Monday or before?

16 THE COURT: I have very good availability Thursday,  
17 Friday, Monday. So yes. I will be available as long as you  
18 all are.

19 MS. CIOLFI: Thank you. We appreciate that, and we  
20 will make every effort to resolve it without bringing it to  
21 your attention, and I'm sure I speak for both sides on that.

22 THE COURT: Let me tie up one thing with the emails.

23 I'm going to order that the defendants can hold their  
24 production in abeyance at this point. It doesn't seem it  
25 makes sense for that to go forward given how extensive or how



1 much work it requires to do that, and the plaintiffs aren't  
2 going to be to be able to use those emails at trial.

3 Anything else from the defendants?

4 MS. LONDOS: No, sir. Thank you.

5 THE COURT: Ms. Ciolfi, anything else from the  
6 plaintiffs?

7 MS. CIOLFI: No, Your Honor. Thank you.

8 THE COURT: Then we will -- you all are going to give  
9 us an update, perhaps as soon as later today, about when  
10 responses to motions to exclude will be filed, and I think  
11 it's still a bit of an open question about when the summary  
12 judgment -- when the opposition to summary judgment will be  
13 filed, but I think that's something you all also should  
14 consider, and I'll certainly let Judge Moon know that the  
15 defendants would like to be heard on the 8th on their motion  
16 for summary judgment.

17 I think that's it.

18 Counsel, thanks for calling in, and have a good day.

19 MS. CIOLFI: Thank you, Your Honor.

20 MS. LONDOS: Thank you.

21  
22 "I certify that the foregoing is a correct transcript from  
the record of proceedings in the above-entitled matter.